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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Equal Employment Opportunity
Commission,

10 Petitioner,

11 v.

12 McLane Company Incorporated,

13 Respondent.
14

No. CV-12-02469-PHX-GMS

ORDER

15 Pending before the Court is Respondent's motion to deny Petitioner's subpoena as
16 unduly burdensome, (Doc. 64), and Petitioner's motion to strike, (Doc. 67).¹ For the
17 reasons stated below, the Court denies the motion.

18 **BACKGROUND**

19 Damiana Ochoa worked for eight years at Petitioner McLane Co., a grocery
20 supply-chain services company. Because jobs like Ms. Ochoa's are physically
21 demanding, McLane requires new and returning employees to undergo a physical
22 examination (called the Physical Capability Exam, or "PCE") that tests range of motion
23 and strength. A third party contractor named Industrial Physical Capability Services, Inc.
24 ("IPCS") administers the PCE. Ms. Ochoa left work for pregnancy leave, and when she
25 returned three months later, she failed the PCE three times. McLane terminated her
26

27 ¹ Petitioner EEOC filed a motion to strike and disregard a letter that Respondent
28 sent to the Court on October 10, 2017, more than a week after Respondent filed its Reply.
(Doc. 67). Respondent did not oppose this motion. Local Rule 7.2 does not allow for a
sur-reply without permission of the Court. The Court therefore grants the motion.

1 employment. Ms. Ochoa then filed a complaint with the EEOC, and the EEOC initiated
2 an investigation of McLane for discrimination.

3 As part of its investigation, the EEOC issued a subpoena requiring McLane to
4 provide information about the administration of the IPCS PCE. The requested
5 information included pedigree information, such as the name, gender, date of birth, social
6 security number and contact information for every person who took the test, along with
7 the reason the person took the test, the person's score on the test, and any adverse action
8 that McLane took based on the person's performance on the test. McLane objected to the
9 request as overly broad, unduly burdensome, and irrelevant to the underlying charge.

10 The Court previously required McLane to provide information about test takers'
11 gender, test score, test date, position, required score for position, and whether the
12 applicant suffered an adverse employment action with ninety days of the test. The Court
13 did not require McLane to provide pedigree information, ruling that such information was
14 not relevant to the charge of discrimination. After a series of appeals, the Ninth Circuit
15 reversed the Court's decision and held that the pedigree information is relevant to the
16 EEOC's investigation. *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816–17 (9th Cir.
17 2017). The Ninth Circuit directed that “[o]n remand, McLane is free to renew its
18 argument that the EEOC's request for pedigree information is unduly burdensome[,]” and
19 “the district court should also resolve whether producing a second category of evidence—
20 the reasons test takers were terminated—would be unduly burdensome to McLane.” *Id.*
21 at 817.

22 DISCUSSION

23 I. Legal Standard

24 The scope of judicial review over an EEOC request for information is narrow.
25 *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816–17 (9th Cir. 2017). As this Court has
26 previously noted, reviewing the validity of an administrative subpoena requires a three-
27 part inquiry: “(1) whether Congress has granted the authority to investigate; (2) whether
28 procedural requirements have been followed; and (3) whether the evidence is relevant

1 and material to the investigation.” *Id.* (quoting *E.E.O.C. v. Children's Hosp. Med. Ctr.*,
2 719 F.2d 1426, 1430 (9th Cir.1983)). When the EEOC has demonstrated that those
3 conditions are met (as it has here), a court must enforce the subpoena unless the
4 respondent “shows that the subpoena is overbroad or that compliance would be unduly
5 burdensome.” *Id.* The “investigatory powers of the EEOC should be interpreted
6 broadly,” but an administrative subpoena “cannot be so broadly stated as to constitute a
7 ‘fishing expedition.’” *E.E.O.C. v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir.1982).
8 However, the respondent’s burden of proving that an administrative subpoena is
9 overbroad or unduly burdensome “is difficult to meet.” *E.E.O.C. v. Aaron Bros. Inc.*,
10 620 F.Supp.2d 1102, 1106 (C.D. Cal. 2009) (citing *E.E.O.C. v. Maryland Cup Corp.*, 785
11 F.2d 471, 479 (4th Cir.1986); *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 654 (7th
12 Cir. 2002)).

13 **II. Analysis**

14 Neither the Ninth Circuit nor the Supreme Court has defined “unduly
15 burdensome” in the context of an EEOC subpoena enforcement request. In line with
16 other districts in the Ninth Circuit, this Court has previously adopted the approach of the
17 Fourth and Seventh Circuits that a subpoena may be unduly burdensome if the cost to the
18 respondent is significant compared to its resources. *E.E.O.C. v. McLane Co., Inc.*, 2012
19 WL 5868959 (D. Ariz. Nov. 19, 2012); *see also E.E.O.C. v. Bashas’, Inc.*, 828 F.Supp.
20 2d 1056, 1070–1071 (D. Ariz. 2011). More specifically, a subpoena is unduly
21 burdensome if either “the cost of gathering this information is unduly burdensome in the
22 light of the company's normal operating costs,” or “gathering the information would
23 threaten [a respondent's] normal business operations.” *E.E.O.C. v. Maryland Cup Corp.*,
24 785 F.2d 471, 479 (4th Cir.1986). Moreover, “[i]f the personnel or financial burden on
25 the employer is great compared to the resources the employer has at its disposal, the
26 district court should attempt to alleviate this burden.” *E.E.O.C. v. United Air Lines, Inc.*,
27 287 F.3d 643, 654 (7th Cir.2002).

28 Although the administrative subpoena may not be used to threaten a company’s

1 normal business operations, the EEOC does not have free reign to impose significant
2 costs for information of minor significance as long as the targeted company's operating
3 budget is large enough. See *E.E.O.C. v. VF Jeanswear, LP*, 2017 WL 2861182 at *6 (D.
4 Ariz. July 5, 2017) (citing *E.E.O.C. v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 763
5 (11th Cir. 2014); *E.E.O.C. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994)).
6 "[T]he decision whether a subpoena is overly burdensome turns on the nature of the
7 materials sought and the difficulty the employer will face in producing them." *McLane*
8 *Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1168 (2017). The Eleventh Circuit's approach
9 considers multiple factors, including balancing hardships and benefits of administrative
10 subpoenas. *E.E.O.C. v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 763 (11th Cir.
11 2014). The Sixth Circuit "weigh[s] the likely relevance of the requested material to the
12 investigation against the burden to [respondent] of producing the material." *E.E.O.C. v.*
13 *Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994).

14 Burdensome inquiries are not amenable to a rigid rule, but "rather, they are the
15 kind of 'fact-intensive, close calls' better suited to resolution by the district court"
16 *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1168 (2017) (quoting *Cooter & Gell v.*
17 *Hartmax Corp.*, 496 U.S. 384, 404 (1990)); see also *E.E.O.C. v. United Air Lines, Inc.*,
18 287 F.3d 643, 654 (7th Cir.2002) ("What is unduly burdensome depends on the particular
19 facts of each case and no hard and fast rule can be applied to resolve the question")
20 (citation omitted). The Fourth and Seventh Circuit's approach of balancing the cost of
21 production against the resources of the company is not mutually exclusive of the Sixth
22 and Eleventh Circuit's approach of balancing the cost of production against the relevance
23 of the requested materials, and the Court will consider all applicable facts in its query.
24 Notwithstanding respondent's ability to defeat the subpoena as unduly burdensome,
25 under any approach, the scope of the Court's review remains narrow, and the
26 respondent's burden remains "difficult to meet." *E.E.O.C. v. McLane Co., Inc.*, 857 F.3d
27 813, 816–17 (9th Cir. 2017); *E.E.O.C. v. Aaron Bros. Inc.*, 620 F.Supp.2d 1102, 1106
28 (C.D. Cal. 2009) (citations omitted).

1 The parties argue whether production of two separate requests—pedigree
2 information, and the reason why PCE test takers were terminated—would be unduly
3 burdensome. The Court considers each separately.

4 **A. Pedigree Information**

5 At present, Respondent McLane has refused to provide the name, social security
6 number, date of application, date of hire, last known address, and phone number of each
7 person who took the PCE from 2006 to present. McLane has already produced other
8 pedigree information of PCE test-takers, including gender, PCE score, and adverse
9 employment action.

10 The original data sets included PCE test-takers names and social security number.
11 Therefore, “[i]f anything, McLane has imposed an extra burden on itself by removing
12 that information from the data sets before producing them to the EEOC.” *E.E.O.C. v.*
13 *McLane Co., Inc.*, 804 F.3d 1051, 1058 (9th Cir. 2015). McLane uses human resources
14 software named PeopleSoft to maintain information about its employees, and it uses an
15 Applicant Tracking System to maintain information about applicants. The large majority
16 of the requested information should be accessible through this software. Additionally,
17 McLane posted revenues of \$48.1 billion in 2016, and the cost of compliance with the
18 subpoena will not threaten its operations.

19 The requested information is relevant to the EEOC’s investigation. McLane
20 invites the Court to calculate as a cost of providing the information the potential costs
21 McLane will incur in investigating responding to questions, and/or defending additional
22 meritless charges against McLane should the EEOC use this pedigree information to
23 pursue such charges. The Court is disinclined to weigh such speculative costs or make
24 premature determinations on the merits of such investigations in determining whether the
25 subpoena is overly burdensome. In light of these facts, the Court finds that the production
26 of pedigree information for PCE test-takers from 2006 to present would not unduly
27 burden Respondent McLane.

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